

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
WESTERN SECTION**

STEVE SACHS, Derivatively On Behalf of }
WAVE SYSTEMS CORP., } Civil Action No. 04-30032-MAP

Plaintiff, }

vs. }

STEVEN SPRAGUE, GERARD T.
FEENEY,
JOHN E. BAGALAY, JR., NOLAN
BUSHNELL, GEORGE GILDER AND
JOHN E. MCCONNAUGHEY, JR., }

Defendants, }

- and - }

WAVE SYSTEMS CORP., a Delaware
corporation, }

Nominal Defendant. }

JEFF SWANSON, On Behalf of Nominal
Defendant, Wave Systems, Corp. }

Civil Action No. 04-30038-MAP

Plaintiff, }

v. }

STEVEN SPRAGUE, GERARD T.
FEENEY, JOHN E. BAGALAY, JR.,
NOLAN BUSHNELL, GEORGE GILDER,
and JOHN E. McCONNAUGHEY, JR., }

Defendants, }

v. }

WAVE SYSTEMS CORP., }

Nominal Defendant. }

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CHARLENE HARVEY, Derivatively On Behalf of WAVE SYSTEMS CORP.,	Plaintiff,	}	Civil Action No. 04-30044-MAP
	vs.		
STEVEN SPRAGUE, GERARD T. FEENEY, JOHN E. BAGALAY, JR., NOLAN BUSHNELL, GEORGE GILDER AND JOHN E. MCCONNAUGHEY, JR.,	Defendants,	}	}
	- and -		
WAVE SYSTEMS CORP., a Delaware corporation,	Nominal Defendant.	}	}

**PLAINTIFF JEFF SWANSON'S SUR-REPLY TO REPLY TO OPPOSITION TO
PLAINTIFFS SACHS AND HARVEY'S MOTION TO CONSOLIDATE CASES AND
APPOINT CO-LEAD AND LIAISON COUNSEL¹**

Plaintiff Jeff Swanson ("Swanson"), plaintiff in the action styled *Swanson v. Sprague, et al.*, Civil Action No. 04-30038 (the "Swanson action"), hereby files this Sur-Reply to Plaintiffs Sachs and Harvey's Reply to the Opposition filed by Swanson to Plaintiffs Sachs and Harvey's Motion to Consolidate Cases and Appoint Co-Lead and Liaison Counsel and Memorandum in Support and states as follows.

In their Reply brief, Sachs and Harvey highlight and tout their chosen lead counsel firm of Robbins Umeda and Fink, LLP's ("Robbins Umeda") "pivotal role" in the settlement in the Hanover Compressor Company ("Hanover Compressor") lawsuits, *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust, et al. v. Hanover*

¹ Plaintiffs Sachs and Harvey have not yet received leave to file their Proposed Reply; however, Plaintiff Swanson submits this Proposed Sur-Reply for consideration should the Court grant leave to file said Reply.

Compressor Co., et al., United States District Court for the Southern District of Texas, Case No. H-02-0410 (the “Hanover Settlement”). This touting demonstrates both Sachs and Harvey’s lack of knowledge concerning their proposed Lead Counsel and perhaps the need for an evidentiary hearing. On April 10, 2002, Robbins Umeda filed a derivative action on behalf of Hanover Compressor Company.² This was the second of five derivative actions eventually filed on behalf of Hanover Compressor. All derivative cases were consolidated on August 20, 2002; however, lead counsel was not named at that time. See, Order dated August 20, 2002, attached hereto as Exhibit 3. Subsequently, on October 3, 2003, the derivative actions were consolidated with the securities class actions upon an unopposed motion by Hanover Compressor. See, Order Consolidating the Consolidated Derivative Action into Consolidated Securities Action, attached hereto as Exhibit 4. In the Securities Class Action, the law firm of Milberg Weiss Bershad Hynes & Lerach (“Milberg Weiss”) was appointed lead counsel and the law firm of Schwatrtz, Junell, Campbell & Oathout, LLP was appointed Liaison Counsel. See, Order dated January 7, 2003, attached hereto as Exhibit 5. Other than filing a Complaint and subsequently receiving other law firms’ work product, Robbins Umeda did little in the way of actually prosecuting the Hanover Compressor derivative action. In fact, Milberg Weiss, the securities class action Lead Counsel, touts the Hanover Settlement on its website as one of its featured cases, and takes credit for

² Sachs and Harvey have raised the issue of ethical violations by F&S; however, Robbins Umeda filed a securities class action suit against Hanover Compressor on February 6, 2002, *Koch v. Hanover Compressor, et al.*, Case No. 02-CV-441. Subsequently, on April 10, 2002, one month after the first derivative action had been filed on behalf of Hanover Compressor, Robbins Umeda used the same individual as a Plaintiff to file its derivative action, *Koch v. O’Conner, et al.*, Case No. 02-CV-1332. Robbins Umeda did not withdraw from the Hanover Compressor securities litigation until June 20, 2002. It is unknown whether Mr. Koch knew that he was a Plaintiff in two separate cases and was, at the same time, seeking to sue Hanover Compressor, and represent Hanover Compressor. See, docket sheets for *Koch v. Hanover Compressor* and *Koch v. O’Conner*, attached hereto as Exhibits 1 and 2, respectively.

negotiating the settlement, including all corporate governance and therapeutic relief obtained. See, Settlement of Hanover Shareholder Litigation, attached hereto as Exhibit 6. Robbins Umeda's claim of any significant role in the Hanover Settlement is therefore a huge overstatement.

Sachs and Harvey further note that Swanson's counsel, Federman & Sherwood ("F&S"), supported Robbins Umeda as lead counsel in a derivative action brought on behalf of SureBeam Corporation, *Haubein v. Oberfell*, Superior Court of the State of California, County of San Diego, Case No. GIC 817150. However, F&S subsequently learned that SureBeam Corporation's bankruptcy trustee had rejected Robbins Umeda's request to represent SureBeam Corporation's bankruptcy estate and would not work with Robbins Umeda because of prior experiences with the firm.³ Had F&S been aware of Robbins Umeda's prior experience with the bankruptcy trustee, F&S would not have "supported" Robbins Umeda as lead counsel in the SureBeam derivative case.

Finally, Sachs and Harvey attach the Order consolidating the derivative actions brought on behalf of Hotels.com, *Pomilo-Wilson v. Blutinger, et al.*, United States District Court for the Northern District of Texas, Case No. 03-CV-0501K, in which Robbins Umeda was appointed Lead Counsel. Since that time, Robbins Umeda's method of prosecuting the Hotels.com derivative action has been to file an agreed Motion with Defendants seeking to have the action stayed pending the resolution of the securities class actions filed against Hotels.com. This motion was denied on March 31, 2004. See, docket sheet for *Pomilo-Wilson v. Blutinger*, attached hereto as Exhibit 7. Robbins Umeda, to Swanson's counsel's knowledge, has not, to date, pursued any depositions in the Hotels.com derivative action.

For all of the foregoing reasons and those previously stated in Plaintiff Swanson's Motion to Consolidate Cases and Appoint Counsel, Jeff Swanson should be appointed Lead Plaintiff in the consolidated derivative actions and his choice of Federman & Sherwood and the Law Office of Alan L. Kovacs should be appointed Lead and Liaison Derivative Counsel, respectively.

DATED: April 30, 2004.

Respectfully submitted,

Plaintiff Jeff Swanson,
By his attorneys,

/s/ Alan L. Kovacs

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³ Robbins Umeda was not appointed Lead Counsel by the Court.

CERTIFICATE OF SERVICE

This certifies that true and correct copies of the above and foregoing were delivered electronically and via facsimile on April 30, 2004 to the following.

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